Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

ARNOLD C. HANSEN and MARILYN J. HANSEN, husband and wife; and LAURIN FOSTER and BETTY A. FOSTER, husband and wife,

Petitioners,

v.

SNOHOMISH COUNTY; the SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER,

Respondents.

On Petition for Writ of Certiorari to the Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a regulatory takings claim based on denial of all "economically viable use" (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)) may be dismissed *as a matter of law* by merely showing that there has not been a total deprivation of value?

2. When regulations allow constructing a house on a parcel, is that use a *per se* "economically viable use" so that a takings claim may be dismissed *as a matter of law* even though undisputed expert testimony concludes that residential construction is not economically reasonable or viable for a builder or the land owner?

3. Where current government land use restrictions require that 96% of a four acre parcel be left in its natural state to serve as a public drainage/water detention basin for a 250 acre upland area (owned by others), is there a taking of the 96% portion that is required to be left economically idle?

4. Does the "ripeness" doctrine require dismissal of a regulatory takings claim where a land owner has not sought a permit for a particular use that is not economically viable?

PARTIES TO THE PROCEEDING

The plaintiffs are Arnold C. Hansen and Marilyn J. Hansen, husband and wife; and Laurin Foster and Betty A. Foster, husband and wife. There are no parent companies or wholly owned subsidiaries.

The defendants are Snohomish County; the Snohomish County Council; and the Snohomish County Hearing Examiner.

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OPINION BELOW

The decision of the Washington Supreme Court in *Hanson v. Snohomish County*, denying the petitioners' petition for review, is reproduced at Appendix (App.) C. The opinion of the Washington Court of Appeals was issued on November 8, 1999, and is attached as App. A.

JURISDICTION

The decision of the Washington Supreme Court denying review was entered on July 11, 2000. App. C. Therefore, this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the Fifth Amendment to the United States Constitution (appended hereto as App. F); Section 1 of the Fourteenth Amendment to the United States Constitution (appended as App. G); and Section 1983 of Title 42 of the United States Code (appended as App. H).

STATEMENT OF THE CASE

This case presents a classic regulatory takings claim in the land use context. As such, it provides an ideal and much needed opportunity to answer significant questions that are fundamental to the analysis to be employed under the Takings Clause of the Fifth Amendment.

Hansen alleges that Snohomish County has applied its zoning and wetland regulations to his property in such a manner as to constitute a taking without just compensation. Just like the property owners in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), Hansen does **not** challenge *the legality* of the land use regulations. The issue is whether otherwise legitimate County regulations effect a taking because of the impact on the landowner.

Here, the County regulations require Hansen to leave 96% of a 3.94 acre parcel in its natural state to serve as a water detention basin for the public. The only remaining use, building one single family house in a small corner of the parcel, is not an "economically viable use." That allegation is supported by undisputed expert opinion testimony. App. D-4 ¶ 14 through D-7 ¶ 21 (Declaration of Paul E. Nolan) (due to an "extremely poor location" the subject site "did not represent a prudent or economically reasonable home building opportunity for a speculative builder or the land owner"). The trial court dismissed the case on summary judgment and the Court of Appeals affirmed.

Hansen's regulatory takings claim is based on two alternative legal standards.[1] **First**, Hansen claims that a taking has occurred because the County's restrictions deny all "economically viable use" of the entire 3.94 acre parcel. *Lucas*, 505 U.S. at 1006, 112 S. Ct. 2886, 120 L. Ed. 2d 798

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[1] Hansen also alleges a taking under the "ad hoc" factual inquiry set forth in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 124 (1978); see also *Lucas*, 505 U.S. at 1019 n. 8. This approach considers a variety of factors to determine whether the effect of regulatory restrictions unfairly shifts public burdens onto private owners. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Washington Court of Appeals dismissed this theory on the same basis that it dismissed the categorical taking. See App. at A-3 through A-4 and subsequent discussion.

(1992) (denial of all economically viable use is a categorical taking).

Second, even if there is not a categorical taking of the entire parcel, there is a taking of at least the 96% portion that is required to be left in its natural state, economically idle, to serve the public as a water detention basin.

Factual Background

In 1979, Hansen purchased about four acres of land near the town of Snohomish in Snohomish County, Washington. The parcel is adjacent to old Highway 2, now referred to as Bickford Avenue. App. at A-1. Before closing escrow, Hansen obtained a grading permit allowing him to place 30,000 cubic yards of fill in the lowland portion of the property—the same area deemed to be a wetland by the County seven years later. App. E-2. To prepare for the fill, Hansen cleared the trees, scraped the site of all grass and brush, and cut tree stumps to six inches above grade. App. E-3. The County inspected and signed off on this preparatory work.

Hansen began filling the lowland area pursuant to the County grading permit; however, he did not complete the filling project. App. E-3. Hansen waited to complete the filling because he thought some "free dirt" might become available from the adjacent highway project.

At that time, the property was zoned R-7200. This designation would allow 16 to 20 houses to be developed on the parcel. App A-2, n. 1. However, the County's comprehensive plan for the area identified the parcel for future commercial use. Because of its location on Highway 2 and adjacent commercial uses, Hansen also believed that commercial use was more appropriate. App. E-2. He therefore sought a rezoning to allow commercial use, but

that rezoning was eventually denied. In subsequent judicial review, the denial of the rezone was upheld as a valid exercise of regulatory power under state law. Accordingly, the property remained zoned for a residential development.

Unfortunately, additional changes in the applicable land use regulations were underway that would also preclude a housing subdivision. Under subsequently enacted wetland regulations, about 96% of the site must now remain in its natural state due to the presence of a wetland.[2] App. A-4. Specifically, the County's expert biologist testified in deposition that the wetland area and buffer should permanently remain in its natural state to allow the wetland to serve as a water detention basin for an upland area more than 50 times greater than the size of the Hansen property. App. J (Excerpt of deposition of Randel Middaugh).

Under the County's wetland restrictions, the only use now allowed on Hansen's property is to build one single family home on a small corner of the parcel adjacent to Bickford Avenue .[3] The County has also changed the zoning density to reflect this reality. The zoning now is R-5 (one single-family home per five acres) therefore rendering the maximum residential development on the 4 acre lot as one house.

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[2] Hansen submitted an application for a new grading permit to authorize the placing of 20,000 cubic yards of fill in the lowland area of the property to complete the filling project that had been previously approved by the County. The County denied that grading permit in June 1987. That final decision confirmed that the County would not allow development and is the date of the taking for which compensation is sought.

[3] The County's planner, Gary Reiersgard, also identified the southwest corner as the only location available for development of a single-family residence.

Bickford Avenue, formerly Highway 2, is characterized by fast moving traffic, a 50 miles per hour posted speed limit, and substantial commercial uses in the immediate vicinity including an adjacent John Deere farm implements dealer, an automobile dealership, and a diesel truck repair facility. Hansen's homebuilder expert, Paul E. Nolan, concluded that the minimum area needed for constructing a modest three-bedroom house, garage, and yard would be about 7,200 square feet of upland. App. D-5. All remaining land area, about 96% of the total, would be required by the County to be placed in a Native Growth Protection Area with a recorded covenant prohibiting all use of that portion of the property. App. I-3 (Excerpt of deposition of Thomas Rowe). Indeed, the county regulation provides that the:

> Native growth protection area is to be left permanently undisturbed in a substantially natural state. No clearing, grading, filling, building construction or placement, or road construction of any kind shall occur, except removal of dangerous trees.

App. I-2

Paul Nolan analyzed whether constructing a house on the remaining useable property is an economically viable option. Mr. Nolan is an expert witness on the subject of home building and land development, with over 31 years experience in all aspects of home building in Snohomish County. App. D-1 to D-3. Mr. Nolan inspected the site, reviewed planning and engineering studies for the property, and reviewed the market conditions and construction costs for the time frame of the alleged taking. After completing this review, he concluded that the site is an "extremely poor location" for a home and that a reasonable builder would not

purchase Hansen's property to build and sell one house. App. D-4 to D-7.

Mr. Nolan also served thirteen years on the board of directors for Summit Savings, and in that capacity helped shape policy direction for all types of loans, including lending for home construction. App. D-3. With that background, Mr. Nolan's expert opinion testimony concluded in part:

> I have worked with many lenders in my building career and I don't believe any of them would make a normal single family home loan to a speculative builder for this site.

App. D-4 to D-5 ¶ 20.

Even if the parcel could be purchased at a deeply discounted price, the house location was so poor compared to other available sites that a reasonable builder would not attempt to develop the property as a homesite. App. D-6 ¶ 17, and D-7 ¶ 21. Paul Nolan also concluded that the landowner would not reasonably develop the property to sell one house for the same reasons.

> In my opinion, the subject site did not represent a prudent or economically reasonable home building opportunity for a speculative builder or the land owner.

Id.

The County offered no contrary expert opinion of any sort. Nor did the County challenge Mr. Nolan's conclusions. In short, Hansen provided substantial evidence through the expert testimony of Paul Nolan that a house on

this particular site is not an economically viable use. **The County provided absolutely no evidence to the contrary.**

The Court of Appeals' Decision

The Court of Appeals opinion holds that Hansen's takings claim is without merit as a matter of law. The court below concluded that Hansen never had a "right" to commercial development. App A-1 and A-4 to A-5. Contrary to the lower court's characterization, Hansen's takings claim is not based on a "right" to commercial development. While commercial use makes far better sense than residential development, Hansen recognizes that commercial use is precluded by the zoning. The takings claim, however, is based on whether *the lawful use of the property* is so limited that there is, in fact, no remaining allowed use that is economically viable.

With respect to the lawful residential use, the Court of Appeals' superficially concluded that because the zoning was residential when the property was purchased, and is still residential today, nothing was taken from Hansen. App A-5. But that analysis ignores that the residential zoning at the time of purchase allowed a density of up to sixteen houses. In contrast, the new wetland restrictions preclude any disturbance of 96 percent of the property. In addition, the residential zoning has been substantially modified to allow only one house on the property.

The problem is that given the parcel's undesirable location for a home, and the locking up of 96 percent of the parcel as a Native Growth Protection Area, building one house is not an economically viable option. Nevertheless, the Court of Appeals ruled that because one house could physically be constructed in the southwest corner of the parcel, there could not be a taking as a matter of law, regardless of whether such use made any economic sense at

all. In effect, the court's ruling interprets *Lucas'* "economically viable use" test as requiring a complete "wipe out" or a "total deprivation" of all value and use. While Hansen concedes that a single house could be permitted on the property, Hansen contends that the economic-viability test of *Lucas* does not require a total deprivation of uses; rather, the test requires a total deprivation of *viable* uses.

The Washington Court of Appeals also rejected Hansen's claim that if there was not a taking of the entire parcel under *Lucas*, there was nevertheless a taking of the 96 percent portion required to be left in its natural state to serve the general public as a water detention basin. App. A-4 n. 8. The lower court rejected this claim on the basis that a single parcel is not divided into smaller portions to determine whether part of the property has been taken. *See Presbytery of Seattle v. King County*, 114 Wn.2d 320, 334-35, 787 P.2d 907 (1990) (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Penn Central*, 438 U.S. at 130-31 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated")). Hansen contends that under the facts here, takings jurisprudence should recognize a taking of the 96 percent portion of his property.

The Court of Appeals also concluded that the takings claim is not "ripe" because Hansen did not apply for a permit to build the one house that would be permitted on his property. App. A-5. Hansen contends that the nature and intensity of permitted development is known and therefore the case is ripe for judicial review. Under this Court's precedents there is no need to apply for a use that all parties agree would be permitted. The allowed use does not present a ripeness issue; rather, it presents the substantive question of whether the permitted use is an economically viable use. Of course, the only evidence before the court

was that the single residence would not be economically viable.

The Washington Court of Appeals is seriously confused in its understanding of both federal takings law and the ripeness doctrine. The disturbingly poor analysis indicates that the lower courts need clear guidance from this Court regarding the proper regulatory takings analysis and application of the ripeness doctrine. These issues are of substantial public importance for many property owners and regulating agencies and should be addressed by this Court.

REASONS FOR GRANTING THE WRIT

I

REVIEW SHOULD BE GRANTED TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT REGARDING THE "ECONOMICALLY VIABLE USE" TEST FOR A REGULATORY TAKING

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court set forth the "economically viable use" test as a cornerstone of regulatory takings law.

> The application of a general zoning law to a particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land.

Id. at 260.

Twelve years later, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, this Court clarified that whenever all economically viable use of property is denied, a regulatory taking is categorically established. *Id.* at 1015.

Although the general rule has been clearly stated, the lower courts have split widely in their understanding of *how* a categorical taking can be found under the "denial of all economically viable use" test. This has occurred because the procedural posture of *Lucas* necessarily left that critical issue unanswered. But as Justice Souter pointed out, determining what satisfies the economic-viability test is an issue that deserves the Court's attention.

A. *Lucas* Necessarily Left Unanswered The Critical Question of Whether the Economic Viability Test Requires A Total Deprivation of Value

The question presented in *Lucas* was: "Does a land-use regulation, pursuant to a state's police power, require compensation under the Constitution's Fifth Amendment if it totally eliminates the value of private property?" Brief of Petitioners on the Merits in *Lucas*, 505 U.S. 1003. In addressing this question, this Court considered whether the trial court's finding that the property was "rendered valueless" resulted in a taking under the economically viable use test. *Id.* at 1020. "This finding was the premise of the petition for certiorari." *Id.* at 1020 n.9.

Because of this finding, *Lucas* necessarily left unanswered whether there can be a denial of all economically viable use when some residual value remains in the property.

> Because the *Agins* test of economic viability was clearly satisfied by the trial court's finding that the property had been

> rendered "valueless," the *Lucas* court did not have to explain the meaning of "economically beneficial or productive."

Laurie G. Ballenger, *A House Built on Sand: Lucas v. South Carolina Coastal Council*, 71 N.C. L. Rev. 928, 944 (1993).

Justice Souter in *Lucas* explained the importance of addressing these issues in a subsequent case.

> The petition for review was granted on the assumption that the State by regulation had deprived the owner of his entire economic interest in the subject property. Such was the state trial court's conclusion, which the State Supreme Court did not review. It is apparent now that in light of our prior cases, the trial court's conclusion is highly questionable.
>
> . . . .
>
> Because the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total (and, in the Court's view, categorically compensable) taking on which it rest. . . . ***[T]he issue of what constitutes total deprivation deserves the Court's attention.***

Lucas, 505 U.S. at 1076-78 (Souter, separate statement) (emphasis added, citations omitted).

This case presents that opportunity. In contrast to the "rendered valueless" finding that defined the context of *Lucas*, the case now at bar asks whether liability can be established under the economic-viability test where it is

conceded that some use and value remains in the property. Hansen contends that while building a home is a potential use, such use is nevertheless not an economically realistic or beneficial use under the facts here. Under these circumstances, is there a total deprivation sufficient to trigger the categorical taking stated under the *Lucas* and *Agins* precedents?

B. The *Lucas* Decision Provides Inconsistent Language Describing How the Economic-Viability Test Is To Be Applied

Lucas provides mixed signals as to how the "economic viability" test is to be determined. For example, *Lucas* at times appears to refer to the economic viability test as requiring showing a complete "wipe out" through loss of all value. For example, in Footnote 8, the majority responded to Justice Stevens' criticism that the majority's decision allowed compensation *only* for property rendered valueless. The majority explained that an owner who does not suffer a "complete elimination of value" might not be able to claim a categorical taking but, nevertheless, would still be able to pursue a taking under the *Penn Central* factors. *Lucas*, 505 U.S. at 1019 n.8. This response to Justice Stevens suggests a denial of all economically viable use occurs, and a categorical taking found, only when there is a complete elimination of value.

Similarly, in Footnote 7, *Lucas* again appears to equate the economic-viability test as a measure of loss of value.

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property

> interest" against which the *loss of value* is to be measured.

Lucas, 505 U.S. at 1016 n.7 (italics added).

In contrast to these references to "loss of value," this Court simultaneously emphasized that determining economic viability is measured by whether the remaining allowed **use** is economically productive, economically beneficial, economically feasible, or viable. *Lucas*, 505 U.S. at 1016-19. *Lucas* stressed that "our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land." *Id.* at 1019 n.8. Repeatedly, the test was stated in terms that reflect that economic viability is *not* a diminution in value test *but is a use test*, focusing on whether the permissible uses are economically productive, beneficial, or viable.

> [W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Lucas, 505 U.S. at 1019.

In short, *Lucas* states clearly the general rule derived from *Agins v. City of Tiburon* that a taking occurs when there has been a denial of all "economically viable use." But left unclear was whether meeting this test *requires* showing a total loss of value (as under the facts in *Lucas*), or whether a taking can be found by showing that the permissible uses are not sufficiently viable, productive, or beneficial to warrant pursuing such use by the landowner or anyone else.

The words of Judge Cynthia Holcomb Hall continue to be true today. "[T]he precise meaning of 'economically viable use' of land is elusive and has not been clarified by the Supreme Court." *Lake Nacimiento Ranch v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir. 1987).

C. The Aftermath of Lucas Is Fundamental Conflict Among the Lower Courts

In the 20 years since *Agins* was decided and the 8 years since the *Lucas* decision, the lower courts have been unable to develop a consistent understanding of the economic-viability test.

On one hand, various cases interpret this Court's precedents as holding that if some use is remaining, there can be no categorical taking. *See e.g. Alegria v. Keeney*, 687 A.2d 1249, 1253 (R.I. 1997) (rejecting taking because even though allowed uses represented a negative return, the owner retained some value in the land); *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) (finding no taking after residential use with a fair market value of $33,300 was prohibited because a timber clear cut might yield $10,000).

On the other hand, other cases acknowledge that the particular use must be analyzed to determine if that use makes meaningful economic sense. See e.g. *Park Avenue Tower Associates v. City of New York*, 746 F.2d 135, 139 (2d Cir. 1984) (analysis of whether the allowed use is sufficiently desirable for property owners to sell to someone for that use); *Yancey v. United States*, 915 F.2d 1534, 1541-42 (Fed. Cit. 1990) (taking found where only remaining use was to sell flock of turkeys for 75 percent of original value).

The inconsistency among opinions is further illustrated by the decisions of the Eleventh Circuit. That

circuit determines whether a use is economically viable by collapsing the *Lucas* categorical test back into the ad hoc factors set forth in *Penn Central*. For example, in *Resolution Trust Corporation v. Town of Highland Beach*, 18 F.3d 1536 (11th Cir. 1994), the Eleventh Circuit held:

> Whether state action denies a landowner all or substantially all economically viable use of his property turns on the economic impact on the claimant and the extent to which the regulation interferes with investment-backed expectations.

Id. at 1549. *See also Reahard v. Lee County*, 968 F.2d 1131, 1135-36 (11th Cir. 1992) (to resolve whether there is a denial of all economically viable use, the fact finder must analyze "at the very least" the economic impact and the extent the regulation interfered with investment-backed expectations); *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072 (11th Cir. 1996).

In *Resolution Trust*, the Eleventh Circuit went on to hold that there was sufficient evidence to support the jury finding that the landowner was denied economically viable use of the property. *Resolution Trust*, 18 F.3d at 1549. Significantly, this finding was upheld by the Eleventh Circuit even though the value of the property never decreased below $2 million. *Id.* Under the value-based methodology used by the Washington Court of Appeals in the present case, that conclusion could not have been reached as a matter of law.

The "economically viable use" test is a cornerstone of federal takings law. It is perhaps the most predominant theory relied upon by landowners seeking relief under the Fifth Amendment. Accordingly, it is critical that landowners, government, and courts correctly understand

how to apply the test. The alternative is continued lack of uniformity in the protection of constitutional rights.

In short, the *Lucas* and *Agins* precedents have clearly stated the general rule but, as Justice Souter pointed, the question of what constitutes a total deprivation deserves this Court's attention.

D. This Court Should Hold That the Economic Viability Test Requires the Fact Finder to Determine Whether Permitted Uses Are Economically Realistic In Light of the Setting and Circumstances At the Time The Government Agency Imposes a New Regulatory Restriction

The Federal Circuit's statement in *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) should guide this Court's clarification of the economic-viability test. Under that case, the court considers the viability of permissible uses simply by conducting a complete and realistic assessment of all the relevant facts. As stated in *Florida Rock Industries*,

> Are alternative permitted activities economically realistic in light of the setting and circumstance, and are they realistically available?

18 F.3d at 1571. This approach is not confined by any specific methodology or outcome. Instead, it places the weight of the analysis, not on a strict formula or a determination that some residual value or use might remain, but on whether the government action unfairly places the burden of public objectives on individuals. *Id.* ("[H]as the Government . . . allocat[ed] to some number of individuals, less than all, a burden that should be borne by all?").

In short, the economic viability of allowed uses must be determined by conducting a complete and realistic assessment of all the relevant facts. *See also Yee v. City of Escondido*, 503 U.S. 519, 523, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992) (economically viable use inquiry "necessarily entails complex factual assessments"). As a predominately factual question, the outcome does not require that all value be wiped out, or that there be a complete deprivation of use. Likewise, the fact that a house may be constructed on Hansen's parcel does not end the inquiry. Rather, that permitted use must be analyzed to determine whether it is economically realistic under the facts and circumstances of the case. Accordingly, the dismissal of Hansen's claim on summary judgment should be reversed and the case remanded for trial.

II

REVIEW SHOULD BE GRANTED TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT REGARDING WHETHER THERE CAN BE A REGULATORY TAKING OF A PORTION OF AN UNDIVIDED PARCEL

Hansen's alternative takings theory contends that the total exclusion of all private uses within a substantial portion of the property *is a taking of that portion of property*. The County's land use regulations place permanent restrictions on any private use of about 96 percent of the property.

Although this Court has stated as a general rule that the regulatory takings analysis considers the "parcel as a whole" rather than segmenting the property into discrete portions (*Keystone Coal*, 480 U.S. at 497; *Penn Central*, 438 U.S. at 130-31), this Court has also stated that under facts such as

presented here, the issue remains undecided.

> When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Lucas, 505 U.S. at 1016 fn. 7. *Lucas* further notes that this Court has produced conflicting decisions including *Keystone*.

The present case, with 96% of the parcel required to be left in its natural state, presents the ideal opportunity to examine this critical issue in takings law. Lower courts have produced widely inconsistent results. Compare *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) (taking of 12.5 acre portion of larger parcel); *Boise Cascade Corp. v. Board of Forestry*, 131 Or. App. 538, 886 P.2d 1033 (1994), *aff'd*, 325 Or. 203, 935 P.2d 422 (1997) *with Presbytery of Seattle v. King County*, 114 Wn.2d 320, 334, 787 P.2d 907 (Wash. 1990); *K & K Construction, Inc. v. Michigan Department of Natural Resources*, 456 Mich. 570, 575 N.W. 2d 531 (Mich. 1998).

Environmental and land use scholar Professor Daniel R. Mandelker analyzed the "relevant parcel" question in Daniel R. Mandelker, *New Property Rights Under the Takings Clause*, 81 Marq. L. Rev. 9 (1997). He notes that "[s]egmentation remains, nevertheless, a troublesome problem that demands closer attention from the Court." *Id.* at 19.

Hansen contends that the total exclusion of all private uses within the wetland and buffer portion of the property *is a taking of that portion of property.* This area is required to be left in its natural state, economically idle, to serve as a public drainage basin for approximately 250 upland acres.

Upon examination of this issue, Hansen will urge the Court to carefully review an insightful law review article written by John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims,* 61 Univ. of Chicago L. Rev. 1535 (1994). The article notes that the this Court

> has not articulated a method for defining the "parcel as a whole." Until these issues are resolved, courts must continue to confront the question: denial of all economically viable use of what?

Id. at 1542.

The article proposes a workable test that correctly defines the relevant parcel in cases such as the present. Hansen contends that the proposed test, which is set forth below, accurately reflects this Court's takings jurisprudence and should be adopted by this Court.

As a basic principle, the regulatory taking inquiry applies to property interests that in fact are substantial enough to warrant Fifth Amendment protection as an independent bundle of rights. *Id.* at 1557. John Fee proposes that the most logical method of measuring the substantiality of a property interest "would depend on its economically productive potential as an independent unit." *Id.* From this, the following rule is proposed.

> [A]ny identifiable segment of land is a parcel for purposes of regulatory takings analysis if prior to regulations it could have been put to at least one economically viable use, independent of the surrounding land segments.

Id.

Under this test,

> a court would begin with the plaintiff's assertion that a particular parcel of land had been taken, examining the parcel to see if it could have been put to at least one economically viable use independent of the surrounding land prior to regulations. If so, the court would determine whether the parcel had been deprived of all economically viable use through government regulation.

Id.

Hansen believes this test appropriately excludes compensation for small portions of parcels, such as setback requirements and landscape buffers, which are not independently economically viable units.

> In many situations, an identifiable segment of land may be put to no economically viable use, other than to expand or beautify a building or business operation existing on a neighboring segment of land. The most obvious example of this is the property between the edge of a building and the street. In most situations, this buffer zone would be of no economic use

> to anyone except the owner of the building, and the owner of the building would have no economic use for it other than to plant grass, expand the existing enterprise, or otherwise add value to a larger segment of land. In such a case, it would be inappropriate to consider the buffer zone an independent parcel for regulatory takings purposes, for it has no economic use in and of itself.

Id. at 1559. In short, the Court asks whether the portion of property in question could be put to profitable, economically viable use if it were the owner's only parcel. If the answer is yes, then the parcel should be considered independently for takings analysis purposes. *Id.* at 1560.

Hansen also recognizes that this test successfully harmonizes most of the takings decisions which deal with the relevant parcel issue.[4]

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[4] This is also consistent with numerous cases recognizing a smaller relevant parcel when the government regulation itself splits the parcel into distinct segments. *See, e.g., American Savings & Loan,* 653 F.2d at 370 (holding that where challenged government action divides the subject property into discrete segments, the property is analyzed as separate parcels for takings purposes); *Nectow v. City of Cambridge,* 277 U.S. 183, 186-87, 48 S. Ct. 447, 72 L. Ed. 842 (1928) (entire tract contained 140,000 square feet of which 29,000 square feet was zoned residential; the larger portion was unrestricted; since "no practical use" could be made of the residential portion, the zoning restriction was invalidated); *Fifth Avenue Corporation v. Washington County,* 282 Or. 591, 581 P.2d 50, 60-61 (Or. 1978) (court divided 20-acre parcel for takings analysis purposes based upon different zoning designations within the parcel; potential taking of the portion designated as a "greenway"); *Aptos Seascape Corp. v. County of Santa Cruz,* 138 Cal. App. 3d 484, 495-97, 188 Cal. Rptr. 191 (1982) (contiguous acreage under a single ownership; relevant

> The only cases in which the standard of independent economic viability would produce a different result are those in which a different result *should* occur. These cases include those such as *Deltona Corp. v. United States* and *Ciampetti v. United States* in which a developer purchases a large tract of land and the government prohibits development on only part of the original purchase. Where the total restrictions on development affect a significant enough segment of land that it could be independently developed for a profit, the principles of fairness and justice underlying the Fifth Amendment require that the owner be compensated for his loss. Such a case would in principle be no different than that of *Lucas*.

Id. at 1562 (emphasis in original).

The test proposed here is not a radical or complicated test. Indeed, similar ideas have been put forward by no less than Chief Justice Rehnquist when he wrote

> where the estate defined by state law is both severable and of value in its own right, it is appropriate to consider the effect of regulation on that particular property interest.

Keystone Coal, 480 U.S. at 520 (Rehnquist, C.J., dissenting).

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portion of takings analysis was the 70-acre portion subject to regulation).

In the present case, this test is clearly satisfied with respect to the 96% portion of Hansen's parcel. This area undoubtedly has economic viability as independent unit since it could be graded and filled so that commercial developments could occur. Hansen's property interest in the 96% portion is indeed substantial and warrants protection under the Fifth Amendment.

III

RIPENESS IS NOT A BARRIER TO REVIEW OF THIS CASE

The third question presented for review concerns application of the "ripeness" doctrine. The Court of Appeals ruled that Hansen must apply for a permit to build the residence that Hansen contends is not economically viable. Such a ruling promotes waste of resources and does nothing to further the purposes of the ripeness doctrine.

Ripeness requires knowing the nature and extent of permitted development. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348, 351 (1986). In Hansen's case, the permitted nature and extent development is known—one house can be built. The County has denied two rezone applications to allow additional use. In 1987, the County also denied re-issuing the grading permit to fill the wetland. Accordingly, a final decision has been reached and the nature and extent of permitted development is known. The takings claim is ripe for judicial review.

This Court has recently clarified its standards for ripeness in the context of an inverse condemnation claim in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725. In *Suitum*, the government agency argued that the plaintiff's

takings claim was unripe because plaintiff had failed to apply for transfer development rights or TDRs. There was no dispute that plaintiff was entitled to approval of TDRs and, on that basis, the agency argued the landowner must apply for such TDRs in order to have a ripe takings claim. The Court rejected the agency's position and ruled that ripeness did not require an application for approval that would surely be granted.

Suitum applies to the facts in this case. The County here states that no final decision was made because Hansen failed to seek approval to build a single-family residence, yet the County affirmatively contends that it would grant approval. Under these circumstances, this Court's analysis in *Suitum* establishes that Hansen's claim is ripe.

> The agency nonetheless argued ... that there remains a "final decision" for the agency to make: action on a possible application by Suitum to transfer the TDRs to which she is indisputably entitled. This is not, however, the type of "final decision" required by our *Williamson County* precedents. Those precedents addressed the virtual impossibility of determining what development will be permitted on a particular lot. ... No such question is presented here.

Suitum, 117 S. Ct. at 1667. The same is true in Hansen's case. We know what level of development is allowed, therefore the takings claim is ripe for review.

CONCLUSION

This case presents undisputed facts in a traditional regulatory takings context thereby allowing the Court to set clear precedent on the workings of the regulatory takings analysis. As the woefully inadequate analysis of the Court of Appeals shows, such guidance is sorely needed.

Because of the procedural posture of *Lucas* – where the property was found to have been "rendered valueless" – it was not necessary for this Court to discuss how the economic-viability test would be applied when there is not a total deprivation of value. That question deserves attention. Likewise, Footnote 7 of *Lucas* left undecided how a takings claim will be analyzed when 90 percent, or 96 percent as here, of a parcel is required to be left in its natural state to serve the general public. That question remains unanswered, but should be resolved here.

For these reasons, petitioner respectfully asks that this petition be granted.

DATED: October 9, 2000.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

ARNOLD C. HANSEN and MARILYN J. HANSEN, husband and wife, and LAURIN FOSTER and BETTY A. FOSTER, husband and wife, Appellants, v. SNOHOMISH COUNTY; the SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER, Respondents.	DIVISION ONE NO. 43763-1-I **UNPUBLISHED OPINION** FILED: NOV 08 1999

BAKER, J. – The Hansens appeal a summary judgment dismissal of their claims against Snohomish County (County). They assert that the County's actions caused an unconstitutional regulatory taking of their land. Because the Hansens never had a right to develop their property for commercial use, and never applied for a permit to develop it for residential use as zoned, there has been no taking. We thus affirm.

Arnold and Marilyn Hansen, along with Laurin and Betty Foster, purchased a 3.94 acre parcel of property in 1979 for $55,000. The property is located at the intersection of Old State Route 2 and 87th Avenue NE, approximately two miles northwest of the City of Snohomish in Snohomish County. Adjacent properties are zoned both residential and commercial.

The Hansens submitted an application to rezone the property from R-7200[1] to general commercial, along with a proposed site development plan consisting of four commercial buildings. The application was denied on the grounds that it was inconsistent with the design review criteria and policies of the Snohomish-Lake Stevens Area Comprehensive Plan. The Hansens reapplied by submitting a new site plan proposal and grading permit application. These were denied. The Hansens appealed to the Snohomish County Council, which upheld the rezone denial.

The Hansens sought judicial review of the rezone denial. They also alleged damages based on the denial of their rezone and grading permit applications, including (1) violation of RCW 64.40; (2) taking or damaging of property without just compensation in violation of article 1, section 16 of the Washington State Constitution; and (3) civil rights violations under 42 U.S.C. section 1983, including a Fifth Amendment takings claim and denial of substantive due process under the Fourteenth Amendment.

The trial court found that the County lawfully denied the rezone application. The Hansens appealed, and this court affirmed, rejecting the Hansens' due process claims and holding that the rezone denial was not arbitrary and capricious.[2] The case was remanded for further proceedings in accordance with our opinion, and the parties made cross motions for summary judgment on the remaining claims.

The trial court denied the Hansens' motions with the exception of their 42 U.S.C. section 1983 claims, which were reserved for jury trial. The court granted the County's motion as to the denial of the grading permit but denied the County's motion as to the section 1983 claims, ruling that the

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[1] The R-7200 zoning classification permits four to six residential units per acre (subject to site-sensitive features and availability of sewer facilities).

[2] Hansen v. Snohomish County, 60 Wn. App. 1012 (1990) (unpublished opinion), review denied, 116 Wn.2d 1018 (1991).

claims were ripe because further recourse to administrative remedies would be futile.

At that point, the parties obtained a stipulation and order for stay of proceedings. The Hansens then applied for septic system permits for both a single-family home and possible commercial use for up to 22 employees, which the Snohomish Health District approved. These permits were valid for three years, but the Hansens did not seek building permits or a rezone for the possible commercial use, and their septic permits expired. Meanwhile, the County rezoned the property from R-7200 to R-5 (one single-family home per five-acre lot).

After the case was set for trial, the County successfully moved for summary judgment seeking dismissal of all causes of action because the Hansens failed to exhaust administrative remedies, the case was not ripe, and there was no taking as a matter of law. The Hansens appeal, contending that the case was ripe because it is apparent that only one single-family residence would be allowed, and that this amounts to a taking.

II

On appeal of summary judgment, the standard of review is de novo, with the appellate court performing the same inquiry as the trial court.[3] Summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[4]

Arguably, our previous decision in this case upholding the rezone denial and finding no due process violations resolved the takings claim as well. [5] However, because the County did not urge this result and because the issue is cast slightly differently, we will reach the merits of the claim.

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[3] Herron v. Tribune Publishing Co., 108 Wn.2d 162, 169, 736 P.2d 249 (1987).

[4] CR 56(c); Hontz v. State, 105 Wn.2d 302, 311, 714 P.2d 1176 (1986).

[5] Hansen, 60 Wn. App. 1012.

The Hansens argue that the County's land use regulations, as applied to their property, prevented them from developing it for commercial use. They acknowledge that the County would allow them to build one single-family residence on the property, but insist that this is not an economically viable use because the site is only suitable for commercial development. They conclude that there has been a taking requiring just compensation, to be determined on the basis that the highest and best use of the property is general commercial.

The Hansens urge us to evaluate their claim under three separate takings theories. First, they argue that the determination of whether all economically viable use has been denied requires a factual analysis unsuitable for resolution by summary judgment.[6] In the alternative, they argue that a trial is necessary for the court to perform an "ad hoc" takings analysis to consider the economic impact of the regulations on them, the extent of interference with reasonable investment backed expectations, and the character of the government action.[7] Finally, they contend that the regulations effectively prevent all use of 96 percent of the property, constituting a total taking of that portion of the total parcel.[8]

The crux of the Hansens' argument is that their property was taken because the land use regulations compelled the hearing examiner to deny their rezone application and grading permit, thus depriving them of their rightful expectation in commercial development. The

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[6] Lockary v. Kayfetz, 917 F.2d 1150, 1155 (9th Cir. 1990); Orion Corporation v. State, 109 Wn.2d 621, 747 P.2d 1062 (1987).

[7] Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

[8] The Hansens acknowledge that the Washington Supreme Court expressly rejected the partial takings theory in Presbytery of Seattle v. King County, 114 Wn.2d 320, 334-35, 787 P.2d 907 (1990) (state law does not divide an undivided parcel of regulated property into smaller portions to determine whether part of the property has been subjected to a total taking).

crucial flaw in this argument is that it presupposes that the Hansens had a right to develop the property under general commercial zoning when they purchased it. They did not, and for that reasons nothing was taken.[9]

The Hansens now own what they purchased: a single lot zoned for residential use. When the Hansens submitted their commercial project proposal and rezone application, the property was zoned R-7200. The property is still zoned for residential use today.[10] As we noted in our 1990 decision upholding the rezone denial:

> The property has the same zoning classification that it had when the Hansens purchased it, and they are still free to develop the property in conformance with that zoning. Thus, there was no governmental action to implicate notions of substantive due process.[11]

For the same reason, the Hansens' takings claim is without merit. The County's regulations have taken no right that the landowner ever owned. We need not address the Hansens' various takings theories because there was no governmental action that could implicate a taking.[12]

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[9] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1006-08, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (when land use regulations deny all economically viable use of land, State must pay just compensation unless the proscribed uses were not part of the owner's title to begin with). Cf. Hodel v. Virginia Surface Min. & Recl. Ass'n, 452 U.S. 264, 294, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981) (failure to identify any property interest which has been taken is a "fatal deficiency" to a takings claim).

[10] The Hansens do not challenge the county's rezone of the property to five acre residential.

[11] Hansen, 60 Wn. App. 1012.

[12] At oral argument, the Hansens urged us to consider the implications of City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624, 143 L.Ed.2d 882, 67 USLW 3681 (1999)

Furthermore, the Hansens have failed to exhaust their administrative remedies. An "as applied" takings claim is not ripe until the implementing agency has reached a final decision regarding the application of the regulations to the property.[13] The reason for this rule is that the nature and extent of permitted development must be known in order to evaluate a takings claim.[14] The County contends that there is no doubt that the Hansens would obtain a permit to construct at least one single-family residence on this property, and the Hansens acknowledge that they never applied for a residential building permit. Moreover, in 1992 and 1993 the Hansens obtained septic system permits for a four-bedroom home and a possible commercial use for 22 employees, but they never sought building permits or a partial rezone to commercial use.

Thus, we hold that the Hansens have failed to set forth a takings claim because none of their property rights were taken by government action and because they failed to exhaust their administrative remedies.

AFFIRMED.

/S/ Baker J.

WE CONCUR:

/S/. Grosse, J. /S/ Coleman, J.

(finding that § 1983 takings claim was properly submitted to jury). However, Monterey is easily distinguishable. In that case, the landowners submitted applications to develop their property in conformance with the city's zoning and general plan requirements. The Hansens never did so.

[13] Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 87 L.Ed.2d 126, 139, 105 S. Ct. 3108 (1985); Presbytery, 114 Wn.2d at 333.

[14] Presbytery, 114 Wn.2d at 338.

APPENDIX B

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

ARNOLD C. HANSEN and MARILYN J. HANSEN, husband and wife, and LAURIN FOSTER and BETTY A. FOSTER, husband and wife, Appellants, v. SNOHOMISH COUNTY; the SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER, Respondents.	DIVISION ONE NO. 43763-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The Appellants having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 6th day of March, 2000.

FOR THE COURT:

/S/ Coleman, J.
Presiding Judge

APPENDIX C

THE SUPREME COURT OF WASHINGTON

ARNOLD C. HANSEN and MARILYN J. HANSEN, husband and wife, and LAURIN FOSTER and BETTY A. FOSTER, husband and wife,	)	NO. 69443-5
	)	**ORDER**
Petitioners,	)	C/A NO. 43763-1-I
v.	)	
SNOHOMISH COUNTY; the SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER,	)	
Respondents.	)	

Department I of the Court considered this matter at its July 11, 2000 Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 11th day of July, 2000.

/S/ Richard P. Guy
CHIEF JUSTICE

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

ARNOLD C. HANSEN and MARILYN J. HANSEN, husband and wife, and LAURIN FOSTER and BETTY A. FOSTER, husband and wife, Plaintiffs, v. SNOHOMISH COUNTY; the SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER, Defendants.	No. 87-2-01838-3 **DECLARATION OF PAUL E. NOLAN IN OPPOSITION TO DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT**

I, PAUL E. NOLAN, declare as follows:

1. I am the president of Nolan Development Company, Inc., which is a land development and home building company.

2. I graduated from the University of Washington with a Bachelor of Arts in business in 1960 with a major in accounting. I worked as a junior accountant for Arthur Young and Company for about six months, and I worked as a loan officer and an escrow officer for Sparkman and McLean Company, a mortgage company, for about five years, from 1961 to 1966.

3. I have been the president of Nolan Development Company, Inc., formerly Nolan Construction Company, Inc., since 1967.

4. Since 1967, my company has developed about 250 single family lots, a 14 unit condominium site plus the condominium units, a 27 unit apartment site plus the apartment units, a 12 unit condominium site plus the condominium units, and built approximately 175 single family homes. My company was also a joint venture partner in a 200 unit condominium project for which I served as the development, construction, and financial manager.

5. A substantial number of these homes and other development occurred in Snohomish County, but also in King and Skagit Counties.

6. I was also president of Pacesetter Construction Company, Inc., from 1966 to 1967, and while my company was inactive, I was a project manager for Dujardin Construction Company from 1977 to 1979.

7. In summary, I have been in the home building and development industry for over 31 years and have experience in all aspects of land development and home construction, including land acquisition, processing of subdivision approvals, obtaining of financing, bidding and management of infrastructure improvements, obtaining building permits, contracting with subcontractors and hiring of employees for construction of homes, and physically constructing the homes.

8. I was a chairman of the Snohomish County Division of the Seattle Master Builders Association, the Snohomish County branch of that association in 1977. In 1979 and 1980 I served as vice-president and then president

for the Seattle Master Builders Association. In 1981 and at the current time, I am serving as the legislative policy committee chairman of the Building Industry Association of Washington, a statewide professional builders association with approximately 6,500 members.

9. In 1980, I participated on the Snohomish County Ad Hoc Land Use Committee which was advisory to the County planning director. In 1991, I participated on the Snohomish County CAPIC Committee which was to help develop a wetland policy that could be support by County citizens. In 1992, I was member of the Snohomish County Planning Commission. In 1994, I participated on the Snohomish County CAB Committee which was to review and comment on planning policies developed by staff for the steering committee of the Snohomish County Growth Management Committee.

10. I was on the board of directors for Summit Savings for 13 years. Summit Savings did a substantial amount of lending to homeowners and for home construction. As a member of the board of directors, I helped shape policy direction to the executive officers regarding all types of loans.

11. I was retained by the law firm representing Plaintiffs to review a development potential for a four acre site at the corner of Bickford Avenue and 87th, which I understand is owned by Plaintiffs and is the subject of this litigation.

12. I have inspected the site, reviewed various planning and engineering studies for the site, have reviewed market conditions for home building in the 1986-87 time frame, and have reviewed construction costs for that same time frame. The following conclusions are based on this review and my experience, education, and training.

13. My conclusions are based on the assumption that the County would grant a building permit to construct a single family residence on the upland area at the southwest corner of the site along Bickford Avenue. My further assumption is that a septic drainfield approval would be granted with a drainfield located at the far southeast corner of the property on the opposite side of the low wet area which covers most of the site including the entire center section from north to south. I am also assuming that the property could only be used for one single family home without the possibility of subdivision. I am assuming normal market conditions which means a wide range of buyers who have discretion regarding their home purchase choices, particularly with respect to location.

14. In general, the location identified as the sole homesite is in an extremely poor location. The homesite is located directly on Bickford Avenue which has a current speed limit of 50 miles per hour and I know from my own personal knowledge that this street has been a busy street with traffic moving at least 50 miles per hour for the last 10 to 15 years. The street does not include any sidewalks that would be in front of the homesite and there is excessive noise from trucks and other vehicles traveling on the road. In addition, a John Deere farm implement dealership is immediately adjacent along the south property line with a noisy loud speaker and trucks and equipment stored helter skelter and moved about on the property.

15. I am a speculative home builder and land developer. A speculative home builder acquires land, selects a building design, and obtains financing, and constructs the home on the "speculation" that a buyer will be found. In contrast, a custom home builder acquires a property and attempts to attract a home buyer interested in the property for whom a home can be "custom" designed

and then constructed. A speculative home builder must become aware of the neighborhood characteristics, including types of homes, price range, utilities, and any other adverse or beneficial influences on the marketability of a home. The old real estate adage that location, location, location is of primary importance is true as well. As a result, a speculative home builder can attempt to tailor the home to fit the neighborhood, but at the same time, a speculative home builder will review many potential home sites for the one that provides the best opportunity for successful project. Assuming that the appropriate permits would be issued, it appears that a small three or four bedroom rambler style home might be sited at the southwest corner of the property while a septic drainfield would be located at the southeast portion of the property. This would entail possibly the relaxation of buffer requirements from the wetland area, and wetland mitigation or restoration for encroaching in that buffer area and for constructing an effluent line through the wetland with a ditch for about 300 feet long by 2 feet wide. The home itself with garage along with sufficient area for driveways, sidewalks, patios, and yard need to cover about 7,200 square feet, the typical size for this zoning, which was R7200 in 1986-87.

16. The sales price of similar homes in the area that were comparable to the proposed home in 1986-87 was approximately $54,000 to $74,000. The cost to build the home would be as follows: Building construction, $30,000; Cost for septic versus sewer, $2,000; Restoration of wetland after constructing effluent pipe, $1,500; Financing (loan fee and interest), $2,700; Selling expenses, $5,600. Assuming that I would be able to sell the home at the upper end of the price range at about $70,000 and assuming higher than normal profit margin of about 21% due to added risk or $14,900, the lot price would have to be priced at $12,500 or less for this project to appear on paper as a feasible building site. However, my opinion is that selling the home for

$70,000 given the negative factors for this site compared to other homes on the market at that time would indicate that the reasonable selling price would need to be lower than $70,000 and closer to the low end of the scale, such as $55,000 to $60,000. At $60,000 and 11% profit, the lot would still have to be priced at $12,500 for the project to appear on paper as a feasible alternative.

17. At the same time, numerous other sites which were generally much better from the standpoint of neighborhood qualities were available for between $22,000 and $40,000. Many of these sites were in true neighborhoods with other five acre homesites adjacent. These other homesites were superior to the Hansen property and would have eliminated concerns regarding the ability to sell the home.

18. It is my opinion that other builders would have come to the same conclusion regarding this site.

19. The most important consideration regarding the subject property for a single family homesite is the buyer who would be interested in living there. I don't know of any customer that ever bought a home from me that would want to live and raise their family on what amounts to a commercial property with a 50 mile per hour highway in front of it. They would not, in my opinion, feel comfortable in allowing their children to catch a school bus or walk along Bickford Avenue to a friend's house, nor would they feel comfortable exiting such a busy street onto their driveway or entering the busy street from their driveway. They would be very annoyed living next to a farm implementation company with noisy loud speaker systems and noise from trucks and equipment there.

20. The subject property does not have any characteristics of a conventional residential lot. It is on a 50

mile per hour highway as opposed to a normal 25 to 35 mile per hour residential road. The use of the property is limited to less than five percent of the area, where comparable properties herein allow full utilization of the property. It adjoins commercial property and has commercial property across the street from it, where the comparable lots are in strictly residential areas. I have worked with many lenders in my building career and I don't believe any of them would make a normal single family home loan to a speculative builder for this site. I think the site would require, in my opinion, someone other than the range of normal buyers and would require a unique and unusual person to want to buy a house on this site.

21. In my opinion, the subject site did not represent a prudent or economically reasonable home building opportunity for speculative builder or the land owner. Other sites were superior and would have generally ensured a reasonable return on investment. The subject site would have had to have been priced so low, about $12,500, to attract my interest, but in my opinion, a property owner in that situation would not sell for that amount given the low end of the comparable sales beginning at $22,000.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and was executed by me this 27th day of August, 1997.

/S/ Paul E. Nolan
Paul E. Nolan

APPENDIX E

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

ARNOLD C. HANSEN and MARILYN J. HANSEN, husband and wife, and LAURIN FOSTER and BETTY A. FOSTER, husband and wife, Plaintiffs, v. SNOHOMISH COUNTY; the SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER, Defendants.	No. 87-2-01838-3 **DECLARATION OF ARNOLD HANSEN IN OPPOSITION TO DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT**

I, ARNOLD C. HANSEN, declare as follows:

1. I am one of the Plaintiffs in this case. The facts stated in this declaration are based on my own personal knowledge.

2. My wife Marilyn Hansen and I, joined by Laurin Foster and his wife Betty Foster, purchased about four acres of land near Snohomish along old Highway 2 in 1979 at a purchase price of $55,000. The property has frontage on what is now Bickford Avenue at the northeast

corner of the intersection of 87th Avenue. In 1979 and ever since, this section of Bickford Avenue has substantial commercial uses including a John Deere farm implements dealership, automobile dealership, diesel truck repair facility, and a bus barn for Snohomish School District.

3. Although through traffic travels on the new Highway 2 a few blocks to the north, Bickford Avenue remains a major thoroughfare between Snohomish and Everett with fast moving traffic and a 50 miles per hour posted speed limit.

4. Before the sale was completed (i.e. before escrow closed), Laurin Foster and I undertook three actions to verify the value of the property. First, we consulted with the County regarding the designation of the property as General Commercial under the new 1979 Snohomish/Lake Stevens Comprehensive Plan. The County confirmed that the property could be rezoned as commercial property consistent with the new comprehensive plan.

5. Second, we knew the site would need to be filled because the center of the site was a low, wet area. We applied for and were issued a grading permit from the County allowing Plaintiffs to place 30,000 cubic yards of fill on their property and an adjacent property. The County had requested that our application be processed as a joint application with the neighboring property owner, Ray Hammer, who was also planning to fill his property. We obliged the County's request. Our application and the permit were based on a Snohomish County approved Engineered Grading Plan.

6. Third, we consulted with licensed engineers regarding the property and these engineers confirmed that a septic drainfield could be constructed on the site after completing the filling project. Thus, we completed the

purchase with a reasonable expectation of obtaining a commercial use of the property.

7. We cooperated with our neighbor Ray Hammer to have the low area on the property cleared to prepare for filling and some filling occurred before being stopped due incomplete compliance. The compliance issue was resolved by scrapping the area to be filled and further clearing it of all vegetative material down to one inch in diameter with stumps cut to six inches above grade. The County inspected this work and approved the filling of the site and later issued another grading permit in 1980. The filling project was not completed.

8. Laurin Foster and I later approached the County to discuss rezoning the property in the early 1980s. The County stated that a moratorium was in effect due to traffic on old Highway 2, and that we should wait until the new Highway 2 opened. We applied for a rezone of the property to General Commercial in 1984, but then withdrew the application and refiled it in 1985. The rezone application was supplemented with a request for a concomittant rezone agreement for a binding site plan with four 8,000 square foot commercial buildings on the site. This application was denied. We filed a second application for a rezone and approval of a concomitant rezone agreement binding site plan in 1986 with revised plans prepared by our engineer to meet the County's concerns. The County also denied this request in February 1987. In December 1986, we submitted an application for a grading permit to authorize the placing of 20,000 cubic yards of fill on the property in the same manner as had been previously approved by the County. The County denied the grading permit in June 1987. The basic reason for denying these applications was that the County wanted to protect the low area of the site which it now deemed as wetland. The County simply changed the rules since we had been

allowed to fill the same area in 1979-80. The County was beginning a concerted effort to protect wetlands which had not existed when we bought the property.

9. In 1992, my consultant applied to the Snohomish Health District for approval of the maximum capacity on-site sewage disposal system feasible on the property without filling wetlands. These applications resulted in the approvals attached to the Second Declaration of Randal S. Darst.

10. I attended the University of Washington and obtained a degree in political science in 1971. I obtained a real estate license in 1979 and later obtained my broker license. To maintain my license, I have taken continuing education courses in various subjects related to real estate.

11. I own Snohomish Properties, a sole proprietorship. Most of the properties in which I represent the buyer or seller are in the Snohomish/Monroe area. My office is in a small town so I tend to be a general practitioner. I sell rural homes and land, farm land, and commercial/industrial property, and as an important part of my profession, I am knowledgeable about the value of these types of properties in the Snohomish/Monroe area.

12. I am intimately familiar with the property which is the subject of this lawsuit as I have been a part owner of the property since 1979. My full time job requires me to stay currently aware of property values in the area including property like the site which is the subject of this lawsuit.

13. My opinion is that the property in February of 1987 with a rezone to general commercial and with fill placed on the property would have been worth $340,000, or about $2 per square foot. The value of the property in June of 1986

when there was a high expectation that the property would be rezoned to general commercial and before fill was placed on the property was about $280,000. The difference in those two values being the cost to fill the property estimated at $60,000 based on 20,000 cubic yards of fill at a cost of $3 per cubic yard.

14. These values are based on comparable sales within the general area and time frame including the Gooch purchase of 4815 Bickford Avenue (now Barr Cedar) in February 1985 for $100,000 (2.70 acres); John Craig sale of 1.4 acres in 1990 for $350,000 with metal pole building; for purchase of 4800 Bickford Avenue in January 1985 for $90,000 (2.313 acres); J.V. Development (Fischer) purchase of 4605 Bickford Avenue in March 1990 for $400,000 (6.28 acres) and later sold to Snohomish School District for $665,000; Smoots Homes, Inc., purchase of 403 Maple Avenue, Snohomish in December 1986 for $66,900; Frank Strahm purchase of 5210 Bickford Avenue in December 1986 for $175,000 reduced to $140,000 for land only (3.23 acres), Smoots Homes, Inc., purchase of 417 Maple Street, Snohomish in October 1989 for $125,000.

15. The subject property was well suited for four commercial buildings of 8,000 square feet each with sufficient additional land for parking, landscaping, access, on-site sewage disposal, drainage facilities, etc. Comparing the potential for commercial space for the subject site with the potential and the sale price of comparable properties supports the above values for the subject property.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and was executed by me this ____ day of August, 1997.

/S/ Arnold Hansen
Arnold Hansen

APPENDIX F

THE FIFTH AMENDMENT

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

APPENDIX G

Fourteenth Amendment to the United States Constitution

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX I

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

ARNOLD C. HANSEN and MARILYN J. HANSEN, husband and wife, and LAURIN FOSTER and BETTY A. FOSTER, husband and wife, Plaintiffs, v. SNOHOMISH COUNTY; the SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER, Defendants.	))))))))))))	No. 87-2-01838-3

DEPOSITION OF GEORGE THOMAS ROWE

APPEARANCES

FOR PLAINTIFFS:	MR. CHARLES A. KLINGE Groen & Stephens 411 – 108th Avenue Northeast Suite 1750 Bellevue, WA 98004-5515
FOR DEFENDANTS:	MS. MILLIE JUDGE MR. JOSEPH B. GENSTER Deputy Prosecuting Attorney Civil Division 2918 Colby Avenue, Suite 203 Everett, Washington 98201
ALSO PRESENT:	Mr. Arnold Hansen

REPORTED BY KAREN M. RUSK, CSR
August 14, 1997

Q. At the bottom of this page, there's some text below the site plan beginning with "Native Growth Protection Area." Could you read that for the record, entirely?

A. "Native growth protection area is to be left permanently undisturbed in a substantially natural state. No clearing, grading, filling, building construction or placement, or road construction of any kind shall occur, except removal of hazardous trees. The activities as set forth in SCC 32.10.110(27)a, c, d, are allowed when approved by the County."

Q. And this site plan has a hatched area which is buffer, with the designation of "NGPA," correct?

A. Yes, it does.

Q. And that's for "Native Growth Protection Area," correct?

A. It is.

Q. There's also an area with plants, which is the actual wetland area, and a line with an arrow, which is the stream, and those two are also part of the native growth protection area, correct?

A. Yes.

Q. Do the code provisions require that some kind of recordation - -

A. Yes, it does.

Q. Could you explain that to me?

A. It requires the recordation of a binding site plan. It is our interpretation and practice to put that on a CASP, a Critical Area Site Plan, which is recorded with the auditor's office in the format that you see in front of you as a part of Exhibit 3.

Q. So that becomes a part of the title; is that correct?

A. It's my understanding, yes.

Q. It's binding on all future owners of the property?

A. Yes.

MS. JUDGE: I would object, I suppose, to the last form of the question, in that it draws a legal conclusion or calls for the drawing of a legal conclusion.

Q. Is it your understanding that future owners would be bound by the recording of this document?

MS. JUDGE: Same objection.
But you can answer the question.

A. Yes.

APPENDIX J

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

ARNOLD C. HANSEN and MARILYN J. HANSEN, husband and wife, and LAURIN FOSTER and BETTY A. FOSTER, husband and wife, Plaintiffs, v. SNOHOMISH COUNTY; the SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER, Defendants.	No. 87-2-01838-3

DEPOSITION OF RANDEL L. MIDDAUGH

APPEARANCES

FOR PLAINTIFFS:	MR. CHARLES A. KLINGE Groen & Stephens 411 - 108th Avenue Northeast Suite 1750 Bellevue, WA 98004-5515
FOR DEFENDANTS:	MR. JOSEPH B. GENSTER Deputy Prosecuting Attorney Civil Division 2918 Colby Avenue, Suite 203 Everett, Washington 98201
ALSO PRESENT:	Mr. Arnold Hansen

REPORTED BY KAREN M. RUSK, CSR
November 15, 1996

Q. You testified that this site is important because the watershed would collect pollutants from upstream, correct?

A. Yes.

Q. And this is a valuable site because it serves as filtering for those pollutants?

A. Yes.

Q. And this is a valuable site because it serves as filtering for these pollutants?

A. Yes.

Q. Now, how big was that watershed again?

A. I believe I said 265 acres in my declaration.

Q. And you thought this site is about five acres?

A. Yeah.

Q. I informed you it was like 3.94, we heard this morning.

So you're saying that this four-acre site and maybe the wetlands on it serves as an important function for that 265-acre watershed?

A. Yes.

Q. Sort of like a natural detention basin?

A. Yes.

Q. Is there other wetlands or detention type basins in that watershed upstream?

A. I'm not sure.

Q. Was this wetland enhanced or caused, in part, by the location of the County road?

A. I don't know.

Q. Meaning the location of Bickford Avenue now and putting a culvert at the release point from the wetland.

A. I will say, I don't believe it was created by those roads. I don't know whether or not it was enhanced or if it got bigger because of those features.

Q. You haven't studied whether there was a small wetland that became larger because of water backing up?

A. No.

Q. Is that possible?

A. Yes.

Q. Do you care?

A. No.

Q. Why should Mr. Hansen and Mr. Foster provide a detention basin for private property of 265 other acres?

MR. GENSTER: Objection; misstates prior testimony and assumes facts not in evidence.

A. It's not my responsibility to make that determination.

Q. Do you think it's fair?

MR. GENSTER: Same objection; assumes facts not in evidence.

A. It's not something that I determine.

Q. Have you ever given it any thought?

A. Not to this specific property, no.

Q. That's really what's going on, though, isn't it, that this small wetland of about three, plus or minus, acres is filtering the water from 265 acres, correct?

MR. GENSTER: Object to the form of the question; assumes facts not in evidence.

A. (No response.)

Q. Isn't that correct?

A. Would you repeat the question?

Q. The three, plus or minus, acres of wetlands on this site is serving and you would like it to continue to serve as a filter for the entire 265-acre watershed upstream?

A. The water that's flowing through this wetland is being filtered. To the extent that it's coming off that 265 acres, this wetland is filtering it.

Q. And that's important?

A. Yes.

Q. And it's important to maintain that and those functions permanently, in your view?

A. Well, yes, to the extent that this ordinance requires it.